Supreme Court, U.S.
FILED
AUG 26 1998
OFFICE OF THE CLERK

(2)

No. 98-203
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STATE OF NORTH CAROLINA,
Petitioner,

v.

RICHARD ALLEN JACKSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NORTH CAROLINA SUPREME COURT

BRIEF FOR *AMICI* STATES OF OHIO, ALABAMA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IDAHO, ILLINOIS, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WISCONSIN, THE COMMONWEALTH OF PENNSYLVANIA AND THE TERRITORIES OF GUAM AND U.S. VIRGIN ISLANDS IN SUPPORT OF PETITIONER

BETTY D. MONTGOMERY
Attorney General of Ohio
JEFFREY S. SUTTON
State Solicitor
Counsel of Record
STEPHEN P. CARNEY
KIMBERLY L. CHARLES
Assistant Attorneys General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

COUNSEL FOR AMICI STATES AND TERRITORIES

20 pp

BILL PRYOR
Attorney General
State of Alabama

BRUCE M. BOTELHO
Attorney General
State of Alaska

GRANT WOODS
Attorney General
State of Arizona

GALE A. NORTON
Attorney General
State of Colorado

JOHN M. BAILEY
Chief State's Attorney
State of Connecticut

M. JANE BRADY
Attorney General
State of Delaware

GUS F. DIAZ
Attorney General
Territory of Guam

MARGERY S. BRONSTER
Attorney General
State of Hawaii

ALAN G. LANCE
Attorney General
State of Idaho

JAMES E. RYAN
Attorney General
State of Illinois

CARLA J. STOVALL
Attorney General
State of Kansas

RICHARD P. IEYOUB
Attorney General
State of Louisiana

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

FRANK J. KELLEY
Attorney General
State of Michigan

HUBERT H. HUMPREY III
Attorney General
State of Minnesota

MICHAEL C. MOORE
Attorney General
State of Mississippi

JOSEPH P. MAZUREK
Attorney General
State of Montana

DON STENBERG
Attorney General
State of Nebraska

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

PHILIP T. McLAUGHLIN
Attorney General
State of New Hampshire

PETER VERNIERO
Attorney General
State of New Jersey

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

JEFFREY B. PINE
Attorney General
State of Rhode Island

CHARLES M. CONDON
Attorney General
State of South Carolina

MARK BARNETT
Attorney General
State of South Dakota

JOHN KNOX WALKUP
Attorney General
State of Tennessee

JULIO A. BRADY
Attorney General
Territory of U.S. Virgin Islands

JAN GRAHAM
Attorney General
State of Utah

WILLIAM H. SORRELL
Attorney General
State of Vermont

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

JAMES E. DOYLE
Attorney General
State of Wisconsin

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF AMICI INTEREST 1

REASONS FOR GRANTING THE WRIT 2

I. UNDER THE FIFTH AMENDMENT, CUSTODY FAILS TO ARISE WHENEVER INDIVIDUALS DO NOT FEEL "FREE TO LEAVE" 3

II. THE LOWER COURT DECISION MISTAKENLY MERGES THIS COURT'S CUSTODY AND SEIZURE INQUIRIES 6

III. THE LOWER COURT DECISION CONFLICTS WITH A WIDE ARRAY OF OTHER LOWER COURT DECISIONS AND THREATENS TO DISRUPT LEGITIMATE LAW ENFORCEMENT EFFORTS 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES **PAGE**

Berkemer v. McCarty,
468 U.S. 420 (1984) 4,7,8,9
California v. Beheler,
463 U.S. 1121 (1983) . . . . . *passim*
Commonwealth v. Morse,
691 N.E.2d 566 (Mass. 1998) 11
Delaware v. Prouse,
440 U.S. 648 (1979) 8
Edwards v. Arizona,
451 U.S. 477 (1981) 3
Feltrop v. Bowersox,
91 F.3d 1178 (8th Cir. 1996)
cert. denied, 117 S. Ct. 1849 (1997) 4
Florida v. Bostick,
501 U.S. 429 (1991) 6,7,11
Florida v. Royer,
460 U.S. 491 (1983) 6
INS v. Delgado,
466 U.S. 210 (1984) 6
Michigan v. Chesternut,
486 U.S. 567 (1988) 6
Miranda v. Arizona,
384 U.S. 436 (1966) . . . . . *passim*
Mosely v. State,
495 S.E.2d 9 (Ga. 1998) 11
Ohio v. Robinette,
519 U.S. 33 (1996) 8
Oregon v. Mathiason,
429 U.S. 492 (1977) . . . . . *passim*

Pennsylvania v. Bruder,
488 U.S. 9 (1988) 8
Schneckloth v. Bustamonte,
412 U.S. 218 (1973) 8
Silva v. State,
951 P.2d 591 (Nev. 1997) 11
Stansbury v. California,
511 U.S. 318 (1994) 4,9
State v. Easler,
489 S.E.2d 617 (S.C. 1997) 11
State v. Gumm,
653 N.E.2d 253 (Ohio 1995)
cert. denied, 516 U.S. 1177 (1996) 10,11
State v. Houser,
678 N.E.2d 95 (Ind. 1997) 10
State v. Jeffreys,
682 A.2d 951 (Vt. 1996) 11
State v. Moore,
885 P.2d 457 (Mont. 1994) 10
Terry v. Ohio,
392 U.S. 1 (1968) 7
United States v. Erving,
1998 U.S. App. LEXIS
(June 26, 1998, 10th Cir.) 4
United States v. Glover,
104 F.3d 1570 (10th Cir. 1997) 11
United States v. Gonzalez,
121 F.3d 928 (5th Cir. 1997),
cert. denied, 118 S.Ct. 726 (1998) 11
United States v. Hocking,
860 F.2d 769 (7th Cir. 1988) 9
United States v. Kelly,
991 F.2d 1308 (7th Cir. 1993) 4

United States v. Knox,
839 F.2d 285 (6th Cir. 1988)
cert. denied, 490 U.S. 1019 (1989) 4,9
United States v. Lee,
699 F.2d 466 (9th Cir. 1982) 10,11
United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 6
United States v. Melvin,
91 F.3d 1218 (9th Cir. 1996) 11
United States v. Mendenhall,
446 U.S. 544 (1980) 6,10
United States v. Murray,
89 F.3d 459 (7th Cir. 1996) 4
United States v. Salvo,
133 F.3d 943 (6th Cir.)
cert. denied, 118 S. Ct. 1805 (1998) 4,9
United States v. Streifel,
781 F.2d 953 (1st Cir. 1986) 9
United States v. Sullivan,
138 F.3d 126 (4th Cir. 1998) 4

CONSTITUTION

U.S. Const., amend. IV . . . . . *passim*
U.S. Const., amend. V . . . . . *passim*

STATEMENT OF AMICI INTEREST

Amicus curiae State of Ohio and 32 other amici States and Territories join North Carolina in urging the Court to grant the petition for certiorari. At stake is whether the "free to leave" test for ascertaining whether an individual has been seized for Fourth Amendment purposes governs the inquiry whether an individual is in custody for Fifth Amendment purposes.

The amici States care about this issue for several reasons. To begin with, the lower-court decision threatens to sow uncertainty in an area that once had relative clarity. By and large State and federal courts have been careful to distinguish between Fourth Amendment inquiries into whether an individual has been seized and Fifth Amendment inquiries into whether an individual's self-incrimination rights have been infringed. Yet, by applying the same verbal formula in both settings – whether a reasonable person would feel "free to leave" under the totality of the circumstances – the lower court decision has blurred a long-accepted line between the distinct inquiries into whether a person has been seized or is in custody.

More than just uncertainty, however, explains the amici States' unified opposition to the decision below. It will immediately unsettle law enforcement efforts in North Carolina and carries the risk of unsettling law enforcement efforts elsewhere in the event other State and federal courts import this method of analysis. The most immediate impact of the decision on law enforcement is this: If individuals are in custody whenever they do not feel free to leave, that means that police must give *Miranda* warnings whenever a Fourth Amendment seizure has occurred. That of course has never been the law. And it is no overstatement to suggest that this development, left unreviewed, could significantly curb well-meaning and until now well-accepted law enforcement practices. It would mean that every *Terry* stop would have to be accompanied by *Miranda* warnings. Nor would this development necessarily be a plus for individuals suspected of crime. Once the line between these

inquiries becomes blurred, it is not clear why courts will not make a similar mistake in the opposite direction. If the custody and seizure tests become one, in other words, courts may just as easily (and just as incorrectly) export aspects of the custody inquiry into the lower threshold of the Fourth Amendment seizure inquiry.

Perhaps above all other reasons for granting the petition, the lower-court decision warrants review because it is wholly incompatible with a series of decisions from this Court. Case after case holds that police need not give *Miranda* warnings whenever an individual has been seized for Fourth Amendment purposes. While State Supreme Courts are free to experiment with new ways of balancing the collective security interests of their society against the liberty interests of their individual citizens, they cannot do so in interpreting the U.S. Constitution. Still less may they do so when their interpretation directly contradicts decisions of this Court. For these reasons and those added below, the amici States respectfully submit this brief for the Court's consideration.

REASONS FOR GRANTING THE WRIT

At issue before the North Carolina Supreme Court was whether respondent was in custody at the time he confessed to murdering a 22 year old woman. The court correctly determined that if respondent was in custody at the time of the confession and if he had already clearly invoked his right to counsel at that time, then the ensuing confession would have to be suppressed. In the eyes of the lower court, however, the custody determination must be framed as follows: "A suspect is in custody when, considering the totality of circumstances, a reasonable person in the suspect's position would not feel *free to leave*." Petition for Writ of Certiorari ("Pet.") 5a (emphasis added). There is no mistaking the "free to leave" orientation of the court's inquiry or the federal ground on which it relies. The

court repeats this verbal formulation at every turn in the analysis. After announcing this understanding of the custody test at the outset, it says "we conclude that a reasonable person in the defendant's position when he was confronted by the sheriff would have felt he was in custody and would not have felt free to leave." Pet. 6a. It then notes that "he was never told that he was free to leave." Pet. 7a. Then again: After being in the interrogation room for a period of time, "a reasonable man *at the least* would have wondered whether he was free to leave." Pet. 7a. (emphasis added). And the coda: "A reasonable man in the defendant's position . . . would not have thought he was free to leave." Pet. 7a. Because this analysis is wrong, threatens to undercut and confuse legitimate law enforcement efforts, and conflicts with decisions of other lower courts, it should be reviewed and reversed.

I. UNDER THE FIFTH AMENDMENT, CUSTODY FAILS TO ARISE WHENEVER INDIVIDUALS DO NOT FEEL "FREE TO LEAVE."

As the lower court recognized, the obligation to provide *Miranda* warnings, as well as the obligation to terminate questioning upon the invocation of the right to counsel, *see Edwards v. Arizona*, 451 U.S. 477 (1981), *Miranda v. Arizona*, 384 U.S. 436 (1966), Pet. 5a, applies "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)(per curiam). In determining what rises to the level of custody for purposes of these obligations, however, this Court has taken a very different path from the lower court.

From *Miranda* forward, the Court has looked not to whether the individual felt "free to leave" but to whether he or she had actually been arrested or so restricted in their movement as essentially to be under arrest. In *Miranda* itself, the Court defined "custodial interrogation" as occuring when "a person

has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. In decision after decision since then, the Court has said that the "ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Stansbury v. California*, 511 U.S. 318, 322 (1994)(per curiam) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Mathiason*, 429 U.S. at 495)). *See also Berkemer v. McCarty*, 468 U.S. 420, 440, 442 (1984) (custody occurs only when a suspect's "freedom of action is curtailed to a degree associated with formal arrest" or there has been the "functional equivalent of formal arrest") (internal quotation omitted). The clear precedent set by this Court, and until now followed almost uniformly by courts across the nation, is that indicia of a formal arrest must accompany questioning or detention by law enforcement officers to support a finding that an individual is "in custody" for *Miranda* purposes. *See United States v. Erving*, 1998 U.S. App. LEXIS (June 26, 1998, 10th Cir.); *United States v. Sullivan*, 138 F.3d 126 (4th Cir. 1998); *United States v. Salvo*, 133 F.3d 943 (6th Cir.) *cert. denied*, 118 S. Ct. 1805 (1998); *Feltrop v. Bowersox*, 91 F.3d 1178 (8th Cir. 1996) *cert. denied*, 117 S. Ct. 1849 (1997); *United States v. Murray*, 89 F.3d 459 (7th Cir. 1996); *United States v. Kelly*, 991 F.2d 1308 (7th Cir. 1993); *United States v. Knox*, 839 F.2d 285 (6th Cir. 1988) *cert. denied*, 490 U.S. 1019 (1989). In custody determinations, a court must consider all of the circumstances surrounding the interrogation from an objective viewpoint, "not [from] the subjective views harbored by either the interrogating officer or the person being questioned." *Stansbury*, 511 U.S. at 322, 323.

The Court, moreover, has applied this well-established test to settings in which individuals, like respondent here, were interrogated in a criminal investigation. Consider the facts of *Mathiason*. The individual voluntarily obliged a police officer's

request to come to the police station for questioning, was told he was not under arrest but was a suspect in a burglary, and was falsely told that police had incriminating evidence against him. The Oregon Supreme Court held that although the individual was not arrested or otherwise formally detained, he was questioned under "coercive" circumstances that triggered his *Miranda* rights and his confession was obtained in violation of Fifth Amendment principles. But "[a]ny interview of one suspected of a crime by a police officer," this Court observed in reversing the decision of the Oregon Supreme Court, "will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." 429 U.S. at 495. For these reasons, the Court concluded, "police officers are not required to administer *Miranda* warnings to everyone whom they question" and *Miranda* does not apply "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Id.* In the end, the Court held that "Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Id.*

For like reasons, the Court in *California v. Beheler* summarily reversed a decision of the California Court of Appeals. There, the state court found custody on the grounds that the interview took place at the police station, the individual was a suspect, and the goal of the interview was to produce incriminating evidence. As in *Mathiason*, however, the individual went to the police station voluntarily, and was told by law enforcement officers that he was not under arrest. Again, this Court held that the "totality of circumstances" on which the lower court focused did not support a finding that the individual was arrested or otherwise formally restrained, and that the confession was validly obtained. *Id.*

The decision of the North Carolina Supreme Court repeats mistakes of the past -- specifically, those of the Oregon Supreme Court in *Mathiason* and of the California Court of Appeals in *Beheler*. Instead of focusing on whether the suspect had been arrested in fact or in effect, the court focused solely on whether a reasonable person in his shoes would have felt "free to leave." This interpretation of the Fifth Amendment lacks support from a single holding of this Court. It should be summarily reversed.

II. THE LOWER COURT DECISION MISTAKENLY MERGES THIS COURT'S CUSTODY AND SEIZURE INQUIRIES.

The lower court decision not only makes new law, but also merges two distinct Fourth and Fifth Amendment concepts. There has long been, and continues to be, a distinction between whether an individual has been seized for Fourth Amendment purposes and whether an individual has been placed in custody for Fifth Amendment purposes.

The Fourth Amendment protects individuals from unreasonable searches and seizures or other "'arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *United States v. Mendenhall*, 446 U.S. 544, 553-554 (1980)(citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)). An individual is "'seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained." *Id.* at 553. In *Mendenhall* this Court held that for Fourth Amendment purposes a "seizure" occurs "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554; *see also Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) ("the Court has since embraced this test"); *INS v. Delgado*, 466 U.S. 210, 215 (1984); *Florida v. Royer*, 460 U.S. 491, 502

(1983)(plurality opinion); *Florida v. Bostick*, 501 U.S. 429, 439 (1991)(setting forth a variant of the *Mendenhall* test: "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter"). It is this test that the North Carolina Supreme Court applied to a custody determination for Fifth Amendment purposes.

Yet it remains well-established under this Court's precedents that there is a distinction between a Fourth Amendment "seizure" and Fifth Amendment "custody." In *Berkemer*, the Court faced the question head on. At stake was whether a routine traffic stop of a motorist constituted a custodial interrogation requiring recitation of *Miranda* rights. In that case, a state highway patrolman forced the motorist to stop his vehicle upon observing it weave in and out of its lane of traffic. 468 U.S. at 423. The officer asked the driver to exit the vehicle and, upon noticing that the driver had difficulty standing, came to the undisclosed conclusion that he would charge the driver with a traffic offense and take him into custody. *Id.* The officer asked the driver to perform a field sobriety test, and when the driver could not complete the test, asked him whether he had been using intoxicants. *Id.* The driver replied that he had, at which point he was formally arrested, taken to the county jail, and subjected to further questioning that resulted in incriminating information. At no time was the driver advised of his *Miranda* rights. *Id.* at 424. Upon being charged with operating a motor vehicle under the influence of alcohol or drugs, the driver moved to exclude all incriminating statements on the ground that they were elicited in violation of his Fifth Amendment rights. *Id.*

The Court accepted certiorari of the case in order to resolve the ambiguity and "confusion in the federal and state courts" regarding "the time at which the Miranda doctrine becomes applicable" in a traffic stop of a detained motorist who has not been arrested. 468 U.S. at 420, 426. Likening the

routine traffic stop to a brief detention of an individual permitted by *Terry v. Ohio*, 392 U.S. 1 (1968), the Court stated: "we have long acknowledged that 'stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth] Amendmen[t], even though the purpose of the stop is limited and the resulting detention quite brief.'" 468 U.S. at 436-37 (citing *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)). The Court then held that individuals "temporarily detained" pursuant to traffic stops are not in custody for Fifth Amendment purposes. *Id.* at 440. *See also Pennsylvania v. Bruder*, 488 U.S. 9 (1988).

As *Berkemer* confirms, a seizure does not rise to the level of a custodial detention. Indeed, the Court went on to analyze the traffic stop under the *Mathiason* test: whether there was evidence to show that the motorist's "freedom of action [was] curtailed to a 'degree associated with formal arrest,'" *id.* (citing *Beheler*, 463 U.S. at 1125), thus entitling the motorist "to the full panoply of protections prescribed by Miranda." *Id.* In holding that Berkemer's prearrest statements to the police were not the product of a custodial interrogation, the Court considered the surrounding circumstances, including the brief duration of the stop prior to the arrest, the few questions posed by the officer, and the routine request for a field sobriety test -- all of which are common to a stop based upon suspicion of an intoxicated driver -- and found that the situation could not "fairly be characterized as the functional equivalent of a formal arrest." *Id.* at 442.

More recently, the Court confirmed the distinction between Fourth Amendment and Fifth Amendment rights in *Ohio v. Robinette*, 519 U.S. 33, 117 S.Ct. 417 (1996), though this time from an opposite perspective. *Robinette* was a Fourth Amendment, not a Fifth Amendment, case, but in essence it also threatened to conflate the two separate bodies of jurisprudence. In *Robinette*, the lower court held that a lawfully seized

defendant must be warned that he is "free to go" before his consent to search, or any "consensual interrogation," could be recognized as voluntary. *Id.* at 419-20. The Court reversed, rejecting the attempt to impose a *Miranda*-style prophylactic rule in a Fourth Amendment setting. *Id.* at 421. *See also Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (also rejecting per se requirement that defendants must know that they can refuse a request to search). Thus, *Robinette* and *Berkemer* both confirm, albeit from different directions, the importance of distinguishing Fourth and Fifth Amendment modes of analysis.

The decisions of this Court have not only set forth distinct tests for "seizure" and "custody" determinations -- *see Salvo, supra; Berkemer, supra; and Knox, supra* -- they also have provided a framework for determining what constitutes the "functional equivalent of a formal arrest" for Fifth Amendment purposes. Indicia of a formal restraint on an individual's freedom of action at least include whether the individual voluntarily subjects himself to questioning by law enforcement authorities; whether an individual's freedom of action is restricted while subjected to questioning and whether he can leave at the conclusion of the interrogation; and whether the individual is told that he is a suspect in an investigation. *See Mathiason, supra; Beheler, supra; Berkemer; supra; Stansbury; supra.* The determination of what circumstances constitute the "functional equivalent of a formal arrest" depends, at least in part, upon how a reasonable person in the suspect's position interprets the situation.

Unlike the North Carolina Supreme Court, other lower courts have been careful to use the "free to leave" inquiry as but one factor in the broader determination of whether a defendant was "in custody" for *Miranda* purposes. *See Salvo, supra* at 950 (holding that for purposes of a Fifth Amendment custody determination, courts may consider the "free to leave" inquiry as one aspect of the totality of the circumstances, though the

inquiry is "not necessarily an ultimate or even dispositive" one); *United States v. Hocking*, 860 F.2d 769, 773 (7th Cir. 1988)(partially reversed on other grounds)(in determining whether the accused was subject to custodial interrogation, the court should consider the totality of the circumstances, including the accused's freedom to leave the scene). But these courts have been vigilant not to collapse the custody inquiry into a "free to leave" analysis. Some courts have been careful specifically to disavow any equating of "custody" and "seizure." *See United States v. Streifel*, 781 F.2d 953 (1st Cir. 1986)(district court mistakenly thought that the principal criterion for determining whether the defendants were in custody for *Miranda* purposes was "free to leave" determination).

III. THE LOWER COURT DECISION CONFLICTS WITH A WIDE ARRAY OF OTHER LOWER COURT DECISIONS AND THREATENS TO DISRUPT LEGITIMATE LAW ENFORCEMENT EFFORTS.

The North Carolina Supreme Court's decision exacerbates a growing split of authority, as it is not the only court to have erroneously used a "free to leave" test in determining custody. Both state and federal courts have made the same mistake. *See United States v. Lee*, 699 F.2d 466, 468 (9th Cir. 1982) ("In such circumstances a reasonably innocent person could conclude that he was not free to leave"); *State v. Moore*, 885 P.2d 457, 475 (Mont. 1994)("If a reasonable person does not feel free to leave, then the examination is custodial.").

Several other courts have in *dicta* indicated that the "free to leave" language is the sole test of "custody," and many of these courts are likely poised to repeat North Carolina's error. For example, the Ohio Supreme Court confused the Fourth Amendment and Fifth Amendment notions of "seizure" and

"custody" in *State v. Gumm*, 653 N.E.2d 253 (Ohio 1995) *cert. denied*, 516 U.S. 1177 (1996). In *Gumm*, this confusion is shown not only by the court's recital of the "free to leave" language as the custody test, but by its citation to this Court's *Mendenhall* and *Bostick* decisions -- which are solely Fourth Amendment seizure cases -- as support for that test. *See id.* at 268. In *Gumm*, however, the Ohio court avoided an erroneous "custody" holding by happenstance, as "the state did not proffer into evidence any statements" made in the disputed "custody" situation, and thus the court did not need to actually apply the custody test. *Id.*

Likewise, the Indiana Supreme Court adopted a "free to leave" test, but it too blunted the effect of its error on other grounds. *See State v. Houser*, 678 N.E.2d 95, 101-02 (Ind. 1997). In *Houser*, the court applied a free to leave test and suggested that custody had occurred. *Id.* However, the court did not rule conclusively, as the defendant had later repeated his pre-*Miranda* statements after *Miranda* warnings were given, rendering any error in admitting the pre-*Miranda* statements harmless. *Id.*

Similarly, other courts have applied a "free to leave" custody test, but have gone on to find that the defendant in question was in fact free to leave, and thus was not in custody. *See, e.g., Mosely v. State*, 495 S.E.2d 9, 12-13 (Ga. 1998) (test is "whether a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave"); *Silva v. State*, 951 P.2d 591, 594 (Nev. 1997) ("[t]he test for whether one is in custody is if a reasonable person would believe he was free to leave"); *State v. Jeffreys*, 682 A.2d 951, 953 (Vt. 1996) (test is "if a reasonable person would have felt free to leave or to refuse to answer police questions"). These cases may well have reached the right result, though by applying the wrong test, as someone free to leave is likely not in custody. But the plain adoption of the "free to leave" test means that an erroneous

custody finding awaits merely a different set of facts. *Compare United States v. Melvin*, 91 F.3d 1218, 1222 (9th Cir. 1996) (custody occurs if "a reasonable person would believe that he is not free to leave," but no custody on these facts) and *United States v. Lee*, *supra*, 699 F.2d at 468 (Ninth Circuit applying same test and finding custody).

On the other side of this split, there are of course many more courts that properly apply the "arrest or indicia of arrest" test in determining custody. *See, e.g., United States v. Gonzalez*, 121 F.3d 928, 939-40 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 726 (1998); *United States v. Glover*, 104 F.3d 1570, 1578 (10th Cir. 1997); *Commonwealth v. Morse*, 691 N.E.2d 566, 570 (Mass. 1998); *State v. Easler*, 489 S.E.2d 617, 621 (S.C. 1997). *See also* Pet. at 19-21, n. 2.

In light of the real-world consequences of this error, and in light of the clear nature of the lower court's error, the amici States join the State of North Carolina in urging the Court summarily to reverse the lower court's decision, or in the alternative to grant the writ and hear the case in full.

CONCLUSION

For the foregoing reasons, the amici States respectfully urge the Court to grant the writ.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
JEFFREY S. SUTTON
State Solicitor
Counsel of Record
STEPHEN P. CARNEY
KIMBERLY L. CHARLES
Assistant Attorneys General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

COUNSEL FOR AMICI STATES AND TERRITORIES

Date: August 28, 1998